Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Docket No. _____

UNITED STATES SUPREME COURT

Oct. term 98

VINEY K. GUPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari

for the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, prose
Viney Gupta
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81 pp

QUESTIONS PRESENTED

1. Does District Court lack jurisdiction to award partial tax refund on certain unsettled tax deductions - *moving expenses* (**$13,950** *for year 1990), travel expenses* (**$2,880** *for year 1990,* **$22,560** *for year 1991), and loss on sale of business property* (**$28,500** *for 1989), which were* left undecided by Tax Court decision, due to *irregularities* in tax court proceedings ?

2. Whether the Court of Appeals erred in affirming district court's grant of IRS motion to dismiss with prejudice petitioner's claim for both tax refund under *28 U.S.C. sect 1346(a)* and civil damages under *sect. 801* of *Taxpayer Bill of Rights 2* on account of unauthorized IRS collection of $82,906 from petitioner using threat of levy?

3. Whether this Court should issue the extraordinary writ of mandamus for Tax Court to determine omitted unsettled tax deductions and award a tax refund upto $43,235, where petitioner cannot obtain adequate relief from any other court, and Tax Court denied disabled taxpayer due process hearing on the unsettled tax deductions on account of medical disability ?

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PETITION FOR WRIT OF CERTIORARI

Petitioner *Viney Gupta* as individual taxpayer respectfully prays that a *Writ of Certiorari* issue to review the judgment (and opinion) of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 24, 1998, including denial of *petition for rehearing* on June 22, 1998.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was not published and is reproduced in the Appendix hereto at page A-1. The Order and Decision of the District Court are reprinted at page A-2.

JURISDICTION

After IRS collected $82,906 from the petitioner in June 1996, pursuant to the Tax Court decision dated July 18, 1995, petitioner filed a complaint with District Court to seek *tax refund* and civil damages for unauthorized tax collection as credit for tax deductions left unsettled by the Tax Court decision.

The District Court dismissed petitioner's complaint *with prejudice* without a hearing, for lack of jurisdiction over the tax refund claim and for failure to state a claim for civil damages. The U.S. Court of Appeals affirmed the district court's decision.

The jurisdiction of this Court is invoked pursuant to *28 U.S.C. sect. 1254(1), 28 U.S.C. sect. 1346(a), 28 U.S.C. 2403(a), and Taxpayer Bill of Rights 2 (enacted by 104th Congress).*

STATEMENT OF THE CASE

Factual Background

On July 18, 1995, the United States Tax Court imposed excessive and erroneous taxes on petitioner, by arbitrarily omitting following unsettled tax deduction from the settlement agreement.

Omitted Deduction / Year	1989	1990	1991
Moving Expenses		***$13,950***	
Travel Expenses		***$2,880***	***$22,560***
Sale of Bus. Prop.	***$28,500***		

To resolve the problem of omitted deductions with the *ambiguous* stipulated settlement, Tax Court's *Hon. Irene Scott* held a conference call among IRS's *Nancy McCurley,* and petitioner, *Viney Gupta,* and said to IRS to *be generous*, and said to petitioner to show *fraud* with the settlement agreement. However, stating that IRS gets over 10% interest on tax regardless of delay, IRS's Nancy McCurley refused to meet with petitioner and filed Motion for Entry of Decision with the statement that "all issues are settled", successfully misleading the Tax Court into granting her motion.

The United States Court of Appeals *affirmed* the tax court decision, absent showing of fraud on part of IRS. The U. S.

Supreme Court *denied* the petition for writ of certiorari (docket 97-201).

REASONS FOR GRANTING THIS WRIT

Pursuant to Supreme Court Rule 20, exceptional circumstances warrant the exercise of the Court's discretionary powers, and *that adequate relief cannot be obtained in any other form or from any other court.*

Petitioner contends that the Tax Court decision should not be given *res judicata* effect with respect to tax deductions left undecided by the tax court. Absent district court jurisdiction, a *writ of mandamus* be issued for tax court to determine the undecided tax deductions and revise its decision.

Petitioner cannot obtain adequate relief in any other form or from any other court.

U.S. Constitution mandates that a person is innocent until proven guilty. Yet, the IRS targetted the disabled petitioner, arbitrarily denied all the deductions to maximize tax assessment, refused timely, fair and neutral determination of facts to resolve tax dispute, issued notice to levy and collected money which destroyed the taxpayer before he could prove his innocence. You are guilty until proven innocent, despite the Constitution. IRS auditors were not neutral, engaged in unauthorized practice of law with grey legal issues in the complex IRS code, and prejudicial

speculation of facts instead of discovery. In early 1997, General Accounting Office advised Congress that there *was abuse, fraud, waste with IRS* audits and procedures, a judicially noticed fact in the news. In Oct. 1996, both Ross Perot and Steve Forbes, presidential candidates, attempted to curb *the IRS abuses*. The IRS has dragged petitioner for seven years as follows.

IRS Field Auditor. From Oct. 1992 to present, the IRS agents refused timely, neutral, and fair determination of the tax deductions for tax years 1989, 1990, 1991. The IRS field agents engaged in *unauthorized practice of law* in deciding legal issues (whether schedule C business was a bonafide business under sect. 183 of the Internal Revenue Code). The IRS appeals officer and district counsel refused to meet with the petitioner, his accountant or attorney, stating that they are bound by the recommendation of the IRS field agent, as if a government conspiracy to defraud taxpayer, absent independent private arbitration.

Tax Court The Tax Court did not reasonably accommodate disabled taxpayer for *amicable* resolution of the tax dispute. *Bail Bonds v. Commissioner of Internal Revenue,* 820 F.2d 1543 (9th Cir. 1987) Tax Court denied motion for reconsideration to determine the unsettled tax deductions after IRS trial attorney stated that IRS will collect taxes with more than 10% on interest and penalty regardless of delay.

The Omission of Petitioner's Unsettled Tax Deductions from the Tax Court Decision Was An Abuse Of Discretion.

Standard of Review. This Court reviews issues concerning the admission of evidence over hearsay or authentication objections for an abuse of discretion. See *United States v. Baylock,* 20 F.3d 1458, 1462 (9th Cir. 1994); *United States v. Dean,* 980 F.2d 1286, 1288 (9th Cir. 1992). In this case, however, IRS has completely failed to show that the exclusion of unsettled tax deductions was not *clearly erroneous*, let alone an *abuse of discretion.*

Petitioner claims that the unsettled tax deductions in the amended tax court petitions were properly admitted. The IRS did not dispute accuracy of the deductions. The tax court admitted the amended petitions into evidence without IRS's objection on hearsay and authentication grounds. .

In any event, hearsay is generally admissible in administrative proceedings. Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975); Hoska v. United States Department of the Army, 677 F.2d 131, 138 (D.C. Cir. 1982) ("Provided it is relevant and material, hearsay is admissible in administrative proceedings generally"). Moreover, petitioner did not dispute the accuracy of the document. See Espinoza v. INS45 F.3d 308, 311 (9th Cir. 1995). Administrative hearings are not bound by the

strict rules of evidence, and the "[t]he sole test for admission of evidence is whether the evidence is probative, and its admission is fundamentally fair." Espinoza, 45 F.3d at 310, citing Trias Hernandez, 528 F.2d at 369. The IRS had an opportunity to contest the substance tax deductions contained in the document, but did not do so. See Villegas-Valenzuela v. INS103 F.3d 805, 812-813 (9th Cir. 1996); Trias-Hernandez, 528 F.2d at 369. IRS's objection to the admission of petitioner's tax deductions thus will be unfounded. See Espinoza 45 F.3d at 310-311.

Taxpayer Advocate

Petitioner met with the Los Angeles taxpayer advocate, who refused to process the tax refund claim, on jurisdictional grounds.

The Court of Appeals

While refusing quick and fair resolution of the tax dispute, the IRS exploited and harassed petitioner with wasteful delays and costs of appealing tax court and district court decisions to the Supreme Court, without sharing the burden of proof, notwithstanding the U.S. Constitution.

CONCLUSION

This Court is respectfully requested to reverse the court of appeals and remand the case to district court to grant petitioner an opportunity to settle tax deductions, which Tax Court arbitrarily

left undecided, in order to seek an tax refund of $43,235 or what the district court determines to be fair, and up to one million dollars in civil damages for unauthorized IRS collection of $82,906 from the petitioner using a pro-IRS excessive tax court decision..

In the alternative, this Court should issue a writ of mandamus to Tax Court to abate tax in consideration of the unsettled deductions, and a writ of mandamus to the district court to determine the issue of civil damages.

Dated: July 22, 1998

Viney Gupta

Viney Gupta, Petitioner prose

NOT FOR PUBLICATION

FILED

APR 24 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINEY K. GUPTA,	)	No. 97-56061
Plaintiff-Appellant,	)	D.C. No. CV-96-01164-AHS
v.	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted April 20, 1998**

Before: BRUNETTI, RYMER and T.G. NELSON, Circuit Judges.

Viney K. Gupta appeals pro se the district court's dismissal with prejudice of his action seeking damages from the Internal Revenue Service and a refund of taxes. We affirm for the reasons stated in the district court's Order filed on June 10, 1997.

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

VINEY K. GUPTA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

I.

PROCEDURAL HISTORY

On February 21, 1997, defendant filed a Motion to Dismiss Complaint and Action With Prejudice. On March 3, 1997, plaintiff filed opposition. Defendant filed its reply on March 7, 1997. The motion was set for hearing on the Court's March 17, 1997, calendar, but was taken under submission without hearing by minute order dated March 11, 1997.

By this Order, the Court dismisses plaintiff's complaint and action with prejudice.

II.

FACTS

Plaintiff alleges that the Internal Revenue Service ("IRS") assessed taxes, penalty and interest for the 1989, 1990, and 1991 tax years against plaintiff amounting to approximately $82,609,

under an "erroneous Tax Court decision." Complaint ¶ 10. Plaintiff further alleges that this Tax Court decision was appealed to the United States Court of Appeals for the Ninth Circuit and that the appeal currently pends. This complaint is brought to "plead factual and legal basis of plaintiff's discrimination-damage claim against IRS." Complaint ¶ 16. Essentially, plaintiff alleges that the IRS targeted him because of his race and disability (multiple sclerosis and other related disabilities), and discriminated against him.

III.

DISCUSSION

The complaint itself does not allege any claim upon which the United States might have consented to suit. Because the plaintiff is proceeding pro se, however, the Court attempts to construe his complaint liberally in order to determine whether dismissal with prejudice is appropriate.

The United States may not be sued without its consent, and the terms of the government's consent define the Court's jurisdiction. Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995). Sovereign immunity thus bars suit against the United States unless waived or inapplicable. Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation 792 F.2d 782, 792 (9th Cir. 1986). 28 U.S.C. § 1331, cited by plaintiff, is not a waiver of sovereign immunity and is therefore not sufficient to

confer jurisdiction upon this Court. Hughes v. United States, 953 F.2d 531, 539 n.5 (9th Cir. 1992)).

1. Claims Under 42 U.S.C. §§ 1981, 1983, 1985, and 1986

Sections 42 U.S.C. §§ 1981, 1983[1], 1985 and 1986, do not apply to actions against the United States, and they therefore cannot provide a basis for finding a waiver of sovereign immunity. Hohri v. United States, 782 F.2d 227, 245 n. 43 (D.C. Cir. 1986), vacated on other grounds 482 U.S. 64 (1987); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982); Unimex v. Department of Housing and Urban Development, 594 F.2d 1060, 1061 (5th Cir. 1979); see also Cato 70 F.3d at 1107. These claims are therefore dismissed with prejudice for lack of jurisdiction.

2. Claim under the Americans With Disabilities Act

The Court dismisses with prejudice plaintiff's claim under the Americans with Disabilities Act ("ADA"). Under Title I of the ADA, only a "covered entity" is prohibited from discriminating against an individual with a disability. 42 U.S.C. § 12112 (a). The United States is exempted from the definition of "covered entities," 42 U.S.C. §§ 12111 (2) and 12111 (5) (B) (I), and therefore cannot be sued under Title I of the ADA.

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[1] The Court notes that plaintiff has abandoned any claim under 42 U.S.C. § 1983, apparently realizing that § 1983 is inapplicable because his complaint does not allege deprivation of constitutional rights by a person acting under color of law of any

Title II of the ADA, which deals with public services applies only to state and local governments, 42 U.S.C. § 12131 (a) (excluding the federal government from its definition of a "public entity"), and therefore does not provide a basis for relief to plaintiff.

Title III of the ADA prohibits discrimination on the basis of disability in public accommodations. 42 U.S.C. § 12182 (a). This complaint clearly does not involve a "public accommodation," as defined in 42 U.S.C. § 12181 (7), and Title III of the ADA therefore does not provide a basis for relief to plaintiff.

3. Other Potential Claims

a. Federal Tort Claims Act Claim

In opposition to defendant's motion, plaintiff argues that the denial of a settlement offer by the "IRS Tax Agency's chief" waived sovereign immunity under 28 U.S.C. § 2675 (a). Construing this as an argument that there is a waiver of sovereign immunity here because his claim is under the Federal Tort Claims Act ("FTCA"), the Court concludes that no claim under the FTCA could be stated here. Under 28 U.S.C. § 2680 (c), excluded from FTCA coverage is conduct "related to the assessment or collection of any tax." Plaintiff's complaint is clearly related to the assessment and collection of tax, and the FTCA does not

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state. See Daly-Murphy v. Winston 837 F.2d 348, 401 (9th Cir. 1981).

provide a waiver of sovereign immunity. To the extent that such a claim has been alleged, it is dismissed with prejudice.

b. Claim Under 26 U.S.C. § 7433

In opposition to defendant's motion, plaintiff also argues that the United States has waived immunity under the "Taxpayer Bill of Rights 2." Although not a separate claim in the complaint, this argument is contained in ¶ 80 of the complaint. As does the government, the Court construes plaintiff's argument as claiming a right to relief under 26 U.S.C. § 7433, dealing with unauthorized collection. The Court concludes that plaintiff has not stated a claim under 26 U.S.C. § 7433.

Plaintiff claims that he was "discriminated on the basis of his race" when he was forced to pay taxes "even though such collection by the IRS is unauthorized under the Taxpayer Bill of Rights 2 since the appeal of the Tax Court decision [determining the deficiency] is pending on before the United States Court of Appeals for the Ninth Circuit." Complaint ¶ 80. He also generally claims in his opposition that the other actions of the IRS in the course of his dealings with the IRS violate this section. In his opposition, plaintiff focuses on an unauthorized collection argument and seeks leave to amend to state such a claim. He argues that the collection by the IRS under the Tax Court decision was unauthorized because the Tax Court decision was procured by fraud, namely it was "ambiguous and based on a fraudulent

settlement agreement and fraudulently-suppressed material unsettled tax deductions ...." Opposition at 2.

Under 26 U.S.C. § 7433, the federal government waives sovereign immunity where "in connection with any collection of Federal tax .... Any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title." The government argues that to meet the jurisdictional prerequisites for a motion under section 7433, one must first exhaust the administrative remedies available to plaintiff within the IRS, citing 28 U.S.C. § 7433 (d) (1), and that since plaintiff has not done this, he cannot bring suit under § 7433.

The government is incorrect regarding exhaustion and is apparently relying upon 26 U.S.C. § 7433 (d) (1) prior to the recent amendment thereto in 1996. Under the current version of 26 U.S.C. § 7433 (d) (1), as amended under Pub. L. 104-168, an award for damage may be reduced if the Court determines that a plaintiff has not exhausted administrative remedies, and there is no longer a requirement of exhaustion. The amendment to § 7433 (d) (1) applies to proceedings commenced after the date of enactment of that act, July 30, 1996. This action was filed November 26, 1996, and the new version is therefore the applicable section. Thus, the failure of plaintiff to exhaust his administrative remedies is not a bar to suit under § 7433.

However, the complaint does not specify any provision of the Internal Revenue Code that was intentionally or recklessly

disregarded, as the statute requires. The closest such allegations are contained in ¶ 80 of the complaint which claims that it is impermissible to assess taxes while the Tax Court decision finding the deficiency is pending on appeal and that it is impermissible to assess taxes under threat of levy.

Even considering the arguments made in opposition as if made in the complaint, these two allegations are the only "collection" wrongs that could properly be raised before this Court. Plaintiff's arguments that the collection was unauthorized because it was pursuant to a Tax Court decision that was invalid is not an issue properly before this Court because it amounts to no more than an argument that the Tax Court decision is incorrect, an issue now before the Court of Appeals and within the Ninth Circuit's exclusive jurisdiction. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Regarding plaintiff's allegations of race and disability discrimination, because these allegations do not refer to any specific provision of the disregarded, these allegations provide no basis for a claim under § 7433.

Plaintiff has not stated a claim for wrongful collection based upon collection during a pending appeal. Under 26 U.S.C. § 6215, once the Tax Court determination of deficiency has become final, the amount determined to be a deficiency shall be assessed and paid upon notice and demand from the Secretary. 26 U.S.C. § 6215. Under 26 U.S.C. § 7485 (a). a notice of appeal of

a Tax Court decision only stays the assessment or collection of taxes if on or before the time the notice of appeal is filed, a bond with certain requirements in a certain amount is filed by the taxpayer. 26 U.S.C. § 7485 (a). Plaintiff does not allege that such a bond was filed with the Court and therefore does not state a claim based upon the alleged wrong of collecting taxes despite a pending appeal.

Plaintiff also has not stated a claim for wrongful collection based on the IRS's "threat of levy." Under 26 U.S.C. § 6331, if any person liable to pay any tax neglects to do so within 10 days after notice and demand, the Secretary may collect such tax by levy on property. 26 U.S.C. § 6331 (a). Notice must be given prior to levy, as specified in 26 U.S.C. § 6331 (d). Merely informing plaintiff about this procedure does not appear to be in violation of any Internal Revenue Code provision, and plaintiff has therefore not stated a claim under 26 U.S.C. § 7433 based merely upon the conclusory allegation of collection under threat of levy.

The Court concludes that amendment would be futile and therefore denies leave to amend.

IV.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion to dismiss the action with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: June 10, 1997

ALICEMARIE H. STOTLER

UNITED STATES

DISTRICT JUDGE

STATUTE

PROP-LEG, [HR 2337], 104th Congress, **Taxpayer Bill of Rights 2** (as approved by the House Ways and Means Committee). Union Calendar No. 240
104th CONGRESS 2D SESSION
[Report No. 104-506] To amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections, MARCH 28, 1996

SEC. 301. Expansion of authority to abate interest: *26 U.S.C. sec. 6404(e)(1)*
SEC. 701. United States must establish that its position in proceedings was substantially justified: *26 U.S.C. 7430(c)*
SEC. 801. INCREASE IN LIMIT ON RECOVERY OF CIVIL DAMAGES FOR UNAUTHORIZED COLLECTION ACTIONS.

(a) GENERAL RULE.--Subsection (b) of section 7433 (relating to damages)
is amended by striking "$100,000" and inserting "$1,000,000."

(b) EFFECTIVE DATE.--The amendment made by subsection (a) shall apply to
actions by officers or employees of the Internal Revenue Service after the date of the enactment of this Act.

SEC. 802. COURT DISCRETION TO REDUCE AWARD FOR LITIGATION COSTS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

(a) GENERAL RULE.--Paragraph (1) of section 7433(d) (relating to civil
damages for certain unauthorized collection actions) is amended to read as follows:

"(1) AWARD FOR DAMAGES MAY BE REDUCED IF ADMINISTRATIVE REMEDIES NOT EXHAUSTED.--The amount of damages awarded under subsection (b) may be reduced if the court determines that the plaintiff has not exhausted the

administrative remedies available to such plaintiff within the Internal Revenue Service."

(b) EFFECTIVE DATE.--The amendment made by this section shall apply in
the case of proceedings commenced after the date of the enactment of this Act.

SEC. 1211. REPORTS ON MISCONDUCT OF IRS EMPLOYEES.

On or before June 1 of each calendar year after 1996, the Secretary of the
Treasury shall submit to the Committee on Ways and Means of the House of
Representatives and the Committee on Finance of the Senate a report on--

(1) all categories of instances involving the misconduct of employees of
the Internal Revenue Service during the preceding calendar year, and

(2) the disposition during the preceding calendar year of any such
instances (without regard to the year of the misconduct).

H.R 2337

[Report No. 104-506]